STATE OF MICHIGAN

COURT OF APPEALS

HILLSDALE COUNTY MEDICAL CARE AND REHABILITATION CENTER,

Plaintiff-Appellee,

v

SERVICE EMPLOYEES INTERNATIONAL UNION and HEATH CARE MICHIGAN,

Defendants,

and

PEGGY WELLS,

Defendant-Appellant.

UNPUBLISHED
April 22, 2014

No. 310024
Hillsdale Circuit Court
LC No. 11-000034-CL

Before: METER, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Defendant Peggy Wells appeals by leave granted from the trial court order that denied her motion for relief from judgment under MCR 2.612(C). Because the trial court abused its discretion by refusing to allow Wells to present testimony or evidence that could have established that its prior decision was based on a mistake, we reverse and remand.

Wells is a licensed practical nurse. She was employed by plaintiff, a long-term care facility, for more than 19 years. The terms and conditions of her employment were governed by a collective bargaining agreement between plaintiff-facility and defendant Service Employees International Union (SEIU). On April 1, 2010, a report was submitted to the facility alleging that Wells used "inappropriate and unrespectful [sic] language" when, in the presence of residents, she loudly disciplined a nursing assistant for not having provided breakfast to some of the residents. It was further reported that when another resident asked Wells a question a few moments after the incident, when Wells was dispensing medications to residents, she "responded loudly and rudely" that the resident was "not allowed to interrupt her med pass."

Plaintiff-facility placed Wells on leave while it conducted an internal investigation of the incident. On April 5, 2010, the facility terminated Wells' employment.

On April 6, 2010, the facility self-reported the incident to the Michigan Department of Community Health's (MDCH) Bureau of Health Systems (BHS). The BHS investigation was completed on April 23, 2010 and the report concluded that

> the reported incident [that a staff member was verbally abusive toward residents] occurred. However, the facility was determined to be in compliance with regulatory requirements in regard to the incident and therefore no citation will be issued.

In addition, a May 14, 2010 letter sent to the facility from John Rojeski, the manager of the Complaint Investigation Unit of the BHS, stated that the BHS had "completed an investigation of a complaint/facility reported incident against the facility," and that "[a]ll issues were resolved during the complaint investigation and resident verbal abuse was substantiated to have occurred by a staff member."

Wells's union, SEIU, objecting to her firing, filed a grievance pursuant to the collective bargaining agreement governing Wells's employment with the facility. The grievance was arbitrated as provided for in that agreement. The arbitrator heard evidence on October 29, 2010 and in a written opinion issued on December 28, 2010, sustained the grievance, ordering that Wells be reinstated and made whole. His ruling rested on three independent grounds. First, he held that the facility's internal investigation, as well as that conducted by the MDCH, suffered from a "fatal procedural error," because they were concluded without interviewing Wells herself, and that "in the absence of any opportunity for the Grievant to present her side of the case, the termination must be found in violation of the collective bargaining agreement and must be set aside." Second, he relied upon the definitions of "abuse" and "verbal abuse" in the facility's employment materials. The relevant definition of "abuse" is "the willful infliction of injury, unreasonable confinement, intimidation or punishment with resulting physical harm, or mental anguish." The relevant definition of "verbal abuse" is

> the use of oral, written or gestured language that willfully includes disparaging and derogatory terms to residents or their families, or within their hearing distance . . . . Examples of verbal abuse include, but are not limited to: threats of harm; saying things to frighten a resident, such as telling a resident that he/she will never be able to see his/her family again.

The arbitrator concluded that "[t]hose definitions bear no cognizable relationship to the facts of this case" which he found as follows:

> Grievant came into the dining room one morning and saw that there were residents who had not been given their breakfast. The CNAs who were responsible for providing those residents with their breakfast had left the dining room and were off doing something else. The CNAs were wrong, and the Grievant brought this to their attention. No doubt she could have done so more tactfully. The Grievant then returned to dispensing medications. She was interrupted by a resident, and she instructed that resident not to interrupt her during med pass. Since the Grievant had previously been disciplined for a medication error, and since that error resulted because of a failure to pay

> sufficient attention, it is understandable that she would resist being interrupted during med pass. But, again, the incident should have been handled more tactfully.

The arbitrator concluded that Wells's lack of tact did not justify charges of abuse or verbal abuse and that those charges "were not even distantly related to the one she may have committed."

Third, the arbitrator concluded that the decision to fire Wells rather than employ "progressive, corrective discipline," as provided for in the contract, was a "serious defect in this termination decision" and noted that "[t]he Employer has made no showing that this discharge [constituted progressive, corrective discipline]." He concluded that "if the Employer had conducted a proper investigation and provided the Grievant with fundamental due process, it may have been able to impose some measure of discipline to address [her] lack of tact."[1]

On January 14, 2013, the facility filed a complaint in circuit court seeking to have the arbitrator's decision vacated on the grounds that enforcing that decision, i.e., reinstating Wells, would violate Section 20173a(1) of the Public Health Code, which provides in pertinent part:

> (1) Except as otherwise provided in subsection (2), a covered facility shall not employ, independently contract with, or grant clinical privileges to an individual who regularly has direct access to or provides direct services to patients or residents in the covered facility if the individual . . . .
>
> * * *
>
> (i) Engages in conduct that becomes the subject of a substantiated finding of neglect, abuse, or misappropriation of property by a state or federal agency pursuant to an investigation conducted in accordance with 42 USC 13951i-3 . . . . [MCL 333.20173a.]

The facility relied upon the investigation report of the BHS resulting from the facility's self-report of the incident. The April 21, 2010 BHS report "substantiated that the reported incident occurred," but did not name Wells nor issue any citations. Moreover, Wells was not interviewed during the investigation and it was not disputed that she was not afforded notice or an opportunity to be heard by the BHS as required by 42 USC 1395i(g)(1)(c). In addition, the Bureau of Health Professions (BHP) issued a letter to Wells, dated May 18, 2010, that dealt

[1] In a separate proceeding, the facility also appealed the determination of the Unemployment Insurance Agency that Wells was not disqualified for unemployment benefits. The facility argued that Wells should be disqualified because she was "discharged for misconduct." MCL 421.29(1); see *Carter v Mich Employment Security Comm*, 364 Mich 538; 111 NW2d 817 (1961). After hearing testimony, the administrative law judge, in a written opinion dated September 9, 2010, affirmed the Agency decision, stating that he "finds that the Claimant was not discharged for misconduct."

specifically with allegations directed against her personally. The letter stated that "[a]fter a thorough review of the matter, we have determined that a violation of the Public Health Code cannot be established" and indicated that the file was closed.

At the March 18, 2011 hearing on the facility's motion to vacate the arbitrator's decision, the facility argued that while the BHP decided not to place Wells on the registry or take any other action against her, the fact remained that the BHS investigation had substantiated a finding of verbal abuse. The facility argued that Wells should have appealed that finding and that she had failed to do so. The trial court agreed that the notice requirements of the statute had not been followed but concluded that the failure to provide notice to Wells should have been raised in an appeal of the BHS report, rather than in response to the facility's motion in circuit court. The court concluded that after reviewing the facts presented, "I don't think there was [] abuse," but held that it could not overturn the BHS finding, which in turn prohibited the facility from reinstating Wells.

Wells subsequently filed a motion for relief from judgment on the grounds that the facility had made misrepresentations concerning the BHS findings. Wells's counsel represented to the court that he had spoken personally with Rojeski, the manager of the Complaint Investigation Unit of the BHS who had sent the May 14, 2010 letter. Counsel represented that Rojeski explained that the BHS investigates complaints against facilities only and that individual employees have no right to appeal BHS findings. In addition, counsel indicated that Rojeski stated that the BHS refers to the BHP questions of whether an individual employee is guilty of abuse. At the motion hearing held April 16, 2012, Wells's attorney sought to take testimony from Rojeski consistent with this offer of proof and also to admit the BHP letter dated May 18, 2010 that stated, "Our records indicate that [the Wells' file] was opened April 26, 2010 and closed on May 17, 2010 based on determination that no violation of the Michigan Public Health Code, 1978 PA 368, as amended, could be substantiated."

The trial court declined to consider the proffered testimony or letter stating, "I'm not taking any testimony. There's no reason for reconsideration. I'm denying it. The record stands as it is. I've made my finding [that the BHS report made a finding of abuse]. You have not convinced me there's anything to the contrary. It stays as it is."

We review a trial court's ruling on a motion for relief from judgment for an abuse of discretion. *Peterson v Auto Owners Ins Co*, 274 Mich App 407, 412; 733 NW2d 413 (2007). MCR 2.612(C)(1)(a) provides that, "[o]n motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding based upon . . . [m]istake, inadvertence, surprise, or excusable neglect." "Mistake" for purposes of MCR 2.612(C)(1)(a) may be that of the trial court. *Fisher v Belcher*, 269 Mich App 247, 262; 713 NW2d 6 (2005). However, generally, relief from judgment will be granted only "when the circumstances are extraordinary and the failure to grant the relief would result in substantial injustice." *Gillispie v Bd of Tenant Affairs of Detroit Housing Comm*, 145 Mich App 424, 428; 377 NW2d 864 (1985). In ruling on a motion for relief from judgment, a trial court "must balance the public interest in achieving finality in litigation versus the private interest of remedying an injustice." *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 203; 446 NW2d 648 (1989).

There is no indication from the record that the trial court considered the "private interest of remedying an injustice" in making its ruling on Wells's motion. *Id*. The trial court indicated that it had previously "made" its finding and that the record "stands as it is," even though Wells's counsel asserted that Rojeski would testify that the trial court's previous conclusion – that there was a substantiated finding of abuse by the BHS against Wells – was erroneous, and that Wells could not have appealed the BHS action as it was not directed at her. Because there is no indication that the trial court engaged in the required balancing inquiry or considered the merits of Wells's motion, it failed to exercise its discretion. And, the "failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). Accordingly, we reverse the trial court's denial of Wells's motion for relief from judgment and "remand the case to allow additional evidence to be taken." MCR 7.216(A)(5).

Our conclusion is bolstered by the fact that it appears very possible that the trial court did, in fact, make a mistake in its findings with regard to the judgment that overturned the arbitrator's award. Assuming that Rojeski's testimony confirms Wells's assertion that she did not have a substantiated finding of abuse on the record against *her*, relief from the judgment would be necessary to avoid an injustice. *Gillispie*, 145 Mich App at 428. Wells's attorney maintained that Rojeski would testify that the abuse on the record was against the facility, not against Wells. This claim is supported by the fact that there is no evidence of a finding of abuse against Wells on Michigan's nursing registry.[2] If Rojeski's proffered testimony and other evidence proves that the BHS could not, or did not, substantiate a finding of abuse against Wells, it would follow that the arbitrator's award, which ordered the facility to reinstate Wells, would not be in violation of public policy under MCL 333.20173a. Moreover, if it is true that there was no substantiated finding of abuse against Wells, and if there was no ruling that she should have or could have appealed at the administrative level, then it was the trial court's responsibility, at the time the facility sought to vacate the arbitrator's decision, to determine whether the BHS finding as to Wells, if any, was reached "pursuant to an investigation conducted in accordance with 42 USC 13951i-3," MCL 333.20173a(1)(i), i.e., with notice and an opportunity to be heard having been afforded to Wells. If the investigation was not "conducted in accordance with 42 USC 13951i-3," its conclusion could not constitute a basis for the court to find that reinstatement of Wells would violate the Public Health Code or the public policy arising from it.

In sum, the trial court abused its discretion by failing to properly address Wells's motion for relief as required by *Mikedis*, 180 Mich App at 203, especially in light of Wells's proffered evidence, which, if true, would establish that the trial court's prior ruling was based on a mistake. Accordingly, we reverse the trial court's denial of Wells's motion for relief from judgment and remand for an evidentiary hearing to allow Wells to present testimony and evidence regarding whether there was a substantiated finding that she engaged in abuse and, if so, whether that

[2] The facility never offered any proof that Wells was placed on a state registry. See also, *Verify a License/Registration*, Department of Licensing and Regulatory Affairs, Bureau of Health Care Services, http://w3.lara.state.mi.us/free/ (accessed March 25, 2014), which confirms that Wells was not placed on the registry.

finding was made "pursuant to an investigation conducted in accordance with 42 USC 13951i-3." MCL 333.20173a(1)(i). Following the presentation of evidence, the trial court shall consider whether the facts, as determined at the hearing, would result in the facility violating MCL 333.20173a if the arbitrator's decision were implemented.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Douglas B. Shapiro